View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Queensland University of Technology ePrints Archive

Queensland University of Technology
Brisbane Australia

This is the author's version of a work that was submitted/accepted for publication in the following source:

Thomas, Rod, Low, Rouhshi, & Griggs, Lynden
(2015)
Designing an automated Torrens system — baseline criteria, risks and possible outcomes.
New Zealand Law Review, *2015*(3), pp. 425-453.

This file was downloaded from: https://eprints.qut.edu.au/96775/

© Copyright 2015 Ingenta

Notice: *Changes introduced as a result of publishing processes such as copy-editing and formatting may not be reflected in this document. For a definitive version of this work, please refer to the published source:*

http://www.ingentaconnect.com/content/lrf/nzlr/2015/00002015/00000003/art00003

Designing an automated Torrens system — baseline criteria, risks and possible outcomes

ROD THOMAS, ROUHSHI LOW AND LYNDEN GRIGGS*

This article is a continuation of a discussion of automation of Torrens regimes, introduced by the authors in [2013] NZ L Rev 227. In this article, the authors explore design constraints affecting automation of Torrens systems against the background of the three criteria previously developed to assess automation proposals: proof of identity (or name); proof of ownership; and proof of authority to deal. They then propose four different measures that may assist in moving any system towards full automation.The article concludes with a summary of seven propositions offered as guidelines to system designers and closes with the following question: if the outcome of automation transfers risk from the registry to conveyancers can that system still properly be considered Torrens in its nature?

When registries are in place, there is a tendency to take their services for granted and consider their costs an unnecessary burden. In contrast, when registries are lacking, the benefits of creating registries are often exaggerated and their costs minimised.[1]

I Introduction

The automation of land registry dealings is a topical subject.[2] The drivers for change seem to be irresistible. As we move towards 21st-century "online" systems, existing paper-based systems are regarded as outmoded and unsafe.[3] In light of modern expectations, they are slow to operate, cumbersome and expensive. Being paper-based, they are also open to abuse, in a way not envisaged

* Respectively, AUT University, Auckland; Queensland University of Technology, Brisbane and University of Tasmania, Hobart. We would like to thank the following for their comments and thoughts: Ed Johnson, Emeritus Fellow, Wolfson College, Cambridge; Ross Anderson, University of Cambridge; Nick Bohm, of the UK-based Foundation for Information Policy Research; Allan Beever, Mary-Rose Russell and Kiri Petrie of AUT University; Peter Gutmann of the University of Auckland, and Stephen Styants, solicitor, Auckland. Much of this material was sourced in 2013–2014, when Rod was a Visiting Fellow of the Cambridge Centre for Property Law, and is based on a paper he delivered at Cambridge University in late 2014. Responsibility for content remains with the authors.

1 Benito Arruñada *Institutional Foundations of Impersonal Exchange: Theory and Policy of Contractual Registries* (University of Chicago Press, Chicago, 2012) at 195.

2 An AGIS Search on "electronic conveyancing" carried out on 28 May 2015 found some 26 books and articles. A selection of those found follows. Rod Thomas "Fraud, Risk and the Automated Register" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 349 at 359–361. John Greenwood and Tim Jones "Automation of the Register: Issues Impacting on the Integrity of Title" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 323. Robbie Muir "Electronic Registration: The Legislative Scheme and Implications for the Torrens System in New Zealand" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 311. Rod Thomas, Rouhshi Low and Lynden Griggs "Australasian Torrens Automation, Its Integrity, and the Three Proof Requirements" [2013] NZ L Rev 227 [Three Proof Requirements]. Rod Thomas, Lynden Griggs and Rouhshi Low "Electronic conveyancing in Australia — is anyone concerned about security?" (2014) 23 APLJ 1. Gabriel Brennan *The Impact of eConveyancing on Title Registration: A Risk Assessment* (Springer, Switzerland, 2015). Peter Rosier "Electronic conveyancing: A new age" (2013) 51(11) LSJ 61. Murray McCutcheon "Farewell to paper: electronic conveyancing to go national" (2013) 87(10) LIJ 40.

3 Thomas, Low and Griggs, "Three Proof Requirements", above n 2.

before computer imaging and photocopying became commonplace.[4] In line with government directives to modernise, automation is a top contender for the "action now" basket.

However, automation has brought with it casualties[5] and false starts.[6] This suggests that any initial rush of enthusiasm needs to be accompanied with a clear understanding of both the issues and associated risks. This is especially so if the system being automated is Torrens based. This is because a key component of Torrens (at least in Australia, New Zealand, Singapore and certain other jurisdictions) is that registration of title is guaranteed by the State and compensation is payable if that guarantee is not met and if the new titleholder is not found guilty of fraud.[7]

Ultimately, there are two major concerns with automation. The first is the continued public confidence in the land titles system. The second is who carries the risk under any automation proposal. If any increased risk of abuse or misuse is passed from the State to conveyancers, as the operators of the system, this will lead to an increase in transactional costs.[8] This occurs as increased conveyancing fees are charged to compensate for increased exposure to liability claims.

II Where we Have Come From

The deeds system reflected policy decisions that existing ownership rights were favoured over transactional security, based on standard nemo dat principles[9] that your title is only as good as that of your predecessor.[10] The operation of constructive notice principles in Equity is probably the best example of this principle in operation.[11]

This policy decision, coupled with the possibility of the assertion of undocumented third party title claims, led to uncertainty of tenure. Such uncertainties resulted in high transactional costs with the possibility of conveyancers being held accountable for client losses arising out of "off register" claims.

Automation is not a large concern under a deeds-oriented system. It is relatively easy to design a system that is no more than a "mere recordation of deeds."[12] Such a system is relatively easy to implement and inexpensive to run, since registration would provide no definitive assurance of result. There can be no objection to reversing a transaction subsequently found to be defective based on standard nemo dat principles. Thus, the system design requirements may be no different from (say) an online product order system, or automated system for calculating leave entitlements.[13]

---

4 At 235.

5 It is reported the England Wales Land Registry wrote off nearly £11m in funds, expended in developing automation proposals. See Catherine Baksi "Land Registry drops e-transfer move" (7 July 2011) The Law Society Gazette <www.lawgazette.co.uk>. See also the comments detailed in Land Registry *Report on responses to e-conveyancing secondary legislation part 3* (2011); and Land Registry *Annual Report and Accounts 2010/11* (HC1158, 2011) at 55

6 A prior Victorian Scheme failed after expenditure of an estimated AUD$40–AUD$50 million. The failure was attributed to institutional lenders not being willing to endorse and back the introduction of the scheme. See Thomas, Low and Griggs "Three Proof Requirements" above n 2, at 249.

7 Peter Butt *Land Law* (6th ed, Thomson Reuters, Pyrmont (NSW), 2010) at [20–67]–[20–77].

8 See generally the economics argument presented by Benito Arruñfada in "Leaky title syndrome?" [2010] NZLJ 115.

9 *Nemo dat quod non habet*, literally meaning "no one gives what he does not have".

10 See the general discussion in Butt, above n 7, at [19-10].

11 At [19–47]–[19–77].

12 Arruñada, above n 1, at 62.

13 Except the registration may be a public way of best demonstrating one's title claim to title to the world. See the Deeds Registration Act 1908, s 35:

> 35 Avoidance of unregistered deed or contract
>
> Every deed or contract authorised by this Act to be registered as aforesaid shall, so far as regards any land to be affected thereby, be void as against any person claiming for valuable consideration under any subsequent deed or contract duly registered unless the earlier deed or contract was registered before the registration of the subsequent deed or contract.

III The Argument for Transactional Security

A *Security of tenure*

It can be argued that a government has a central concern in providing for the security of the housing stock occupied by its citizens, by effecting a sound and reliable registration system. This is certainly seen by the World Bank as a central plank for development of underperforming economies.[14]

The Torrens system was introduced from the late 1850s[15] to provide for certainty of tenure, as a reaction to the uncertainties attendant on the operation of the deeds system.[16] Its operation amounts to an adoption of a set of business rules, focused on security of transactions, rather than the protection of existing title interests. Thus, in the interests of transactional certainty, there are clear winners and losers. Once the dynamic security associated with the purchase process is guaranteed to the newly minted indefeasible interest, that interest becomes liable to be defeated by a later purchaser acting without fraud. Benefits of transactional security come at the burden of passive ownership.[17] If a registered interest is lost because of the operation of these rules, the State will pay compensation, which (hopefully)[18] is fair recompense.

However, some have suggested that the benefits of certainty of outcome produced by the operation of Torrens principles under a paper-based system were overstated, and a fair system should allow for hard cases.[19]

To what extent then, is this premium on certainty of outcome defensible? Is a less secure system in terms of predictable outcomes nevertheless successful, in terms of system design, provided incidents of abuse are not common? This thinking is somewhat similar to Kaldor-Hicks criterion,[20] where a change in policy or policy regime can be viewed as beneficial if the overall gains made are more significant than the total of the losses. Such thinking is behind the recent New Zealand Law Commission proposal to allow registration to be overturned in the absence of a fraud finding, where an instance of "manifest injustice" can be shown.[21]

Such arguments patently conflict with the advocates of pure Torrens simplicity, who argue public confidence is, ultimately, linked to certainty of outcome leading to reduced transactional costs.[22] Such proponents point out that this is a much acknowledged reason for the success of the Torrens system over the prior deeds registration system.[23]

---

14 This comment is often directed by the World Bank to developing countries. Current initiatives including countries like Brazil, Kenya, and Morocco can be found at The World Bank "Projects & Operations" <web.worldbank.org>. The principles also remain true for developed countries that are looking to re-establish the principles of recording land transactions. Italy is a recent example of this. See also Aparajita Goyal "Benefits of Land Registry Digitization" (17 April 2012) World Bank <blogs.worldbank.org>.

15 Real Property Act 1858 (SA); see generally, Butt, above n 7, at [20–04].

16 Butt, above n 7, at [20–01]–[20–04].

17 See Pamela O'Connor "Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems" (2009) 13 Edin LR 194.

18 In *Burmeister v Registrar-General of Land* [2014] NZHC 631, (2014) 15 NZCPR 91, the Registrar-General successfully argued compensation awarded under s 172(b) of the Land Transfer Act 1952 was pegged at the value of the land at the date of deprivation. This led to a significant under recovery by victims of cynical fraud. See further comment by Don McMorland "Compensation under the Land Transfer Act" (2014) 16 BCB 75.

19 See Anthony Mason "Indefeasibility — Logic or Legend?" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 3 at 17–19; and Greenwood and Jones, above n 2, at 345–347.

20 For a discussion of the application of Kaldor-Hicks to Torrens transactions, see Luis J. Arrieta-Sevilla "A Comparative Approach to the Torrens Title" (2012) 20 *APLJ Lexis* 31.

21 See Law Commission *A New Land Transfer Act* (NZLC R116, 2010) at [2.11]–[2.16].

22 See generally, Rod Thomas "Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act" [2011] NZ L Rev 715.

23 Law Commission, above n 21, at iv.

Further, a system has integrity because it is soundly engineered. The extent to which that system has (or has not) been made the subject of recorded abuses is really a matter of secondary importance. A system that is open to abuse will eventually invite abuse. This secondary issue is one of timing, and cannot sensibly be relevant in terms of issues of system design.[24] Indeed, even if statistically low incidents of abuse are recorded (and therefore be justified in terms of savings in operating costs) the issue may have consequences in terms loss of public confidence that "homes" are protected and safe from fraud and registration abuses.[25] As Arruñada notes, such a lack of confidence is clearly an economics issue:[26]

> Everybody agrees that security of property is essential for development. All owners want their rights to be universally respected. If they do not feel secure, if their rights are weak, they will be unwilling to invest, and this will hinder economic growth.

Faced with transactional uncertainty, an award of monetary compensation for loss in a few high profile cases may be considered to be an inadequate response. Thus, the issue of system design becomes critical.

B *The associated issue of cost and risk*

The paper-based Torrens system was designed to enable dealings to be placed for registration by the parties themselves, without the need for specialist assistance.[27] This simplicity was promoted as a means of reducing transactional costs for consumers as the ultimate beneficiaries of the system. This was not perceived to lead to an increase in the risk of abuse, due to the State itself accepting the responsibility for policing it.

This point is amply illustrated in the Australasian paper-based Torrens systems by the absence of any known prosecutions of parties who presented casual or incorrect dealings for registration over the last 160 or so years,[28] despite such users being required to certify to the registrar that the presented dealing was correct and could be relied upon.[29] Indeed, the zealous protection of the registry staff easily led to perceptions of "over policing" of the register.[30]

A key indicator of the success of the operation of this paper-based Torrens system is found in the 2010 New Zealand Law Commission Report proposing the introduction of a new Land Transfer Act.

---

24 We are indebted to Ross Anderson, Professor of Security Engineering, Computer Laboratory, Cambridge University for making this clear to us. Landonline has previously been suggested to be unsafe in terms of system design. See generally, Thomas, Low and Griggs "Three Proof Requirements", above n 2. There may be other reasons than system design to explain abuse or lack of abuse of a system.

25 This may be why a Kaldor-Hicks criterion analysis may not be useful. For a Kaldor-Hicks criterion analysis to be useful, surely we have to measure the *risk* of abuse as a component part of the "losses" in order to then assess how losses may then be measured against the "gains"? Indeed, even a few instances of vulnerable people losing their homes, or property of unique national or regional significance being transferred out of public ownership, could affect public confidence in the integrity of the "system".

26 Arruñada above n 1, at 21.

27 Land Transfer Regulations 1966, reg 15 (revoked).

28 The Torrens system was first induced in South Australia in the late 1850s.

29 Patently such claims could be made. Most Australasian systems require certification from the party deriving the benefit of the registered transaction that the dealing was "correct for the purposes of [the Land Transfer Act]": see for New Zealand, s 164 of the Land Transfer Act 1952 which in subs (3) additionally provides for prosecutions where such certificates are given "falsely or negligently". See also s 17 of the Land Titles Regulations 2012 (Tas) which allows the Recorder to refuse to accept a lodged dealing where it does not comply in all respects with the requirements of the Act. Similarly, s 153 of the Land Title Act 1994 (Qld) indicates that a Registrar may only register an instrument if it complies with the Act.

30 Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 238–239.

It describes the Land Transfer system as "one of the great legal reforms of the 19th century. It gave people security in their dealings with land".[31]

IV Need for Change

No argument can seriously be raised against the proposition that the paper-based Torrens systems are now outdated.[32] It is accepted the manual system had credibility, but only in terms of the operating environment of the late 19th and early 20th century.

From the late 1960s onwards, stresses in the operation of paper based systems became patently obvious. The advent of computers and document copying facilities made issues of security tenuous under a paper-based system.[33] In Austrasian jurisdictions, there were known examples of prolonged delays in processing paper-based registration, of up to 12 months. This is discussed elsewhere.[34] Given the extent of change in the operational environment, any automated system may need to be more than a generational update. It will be required to operate in a different environment, which is not paper-based.

V Tools for Analysis

In earlier writing,[35] we have suggested that the credibility of any registration process must be assessed under three headings.

These are: "proof of identity", "proof of ownership", and "proof of authority to deal".

"Proof of identity" (perhaps better expressed as "proof of name")[36] is the need for people wishing to deal with an interest in the land to identify themselves. A passport or a driver's licence issued in the name of John Smith, properly understood, is evidence only that the person before you has a passport or driver's licence in that name, with a photographic licence embedded within that document. At best, it is not by itself, proof (indeed any proof at all) that the person before you is a particular "John Smith" for other purposes.

"Proof of ownership" is the next requirement. This is proof that the same John Smith before you is the same "John Smith" who owns the interest he or she wishes to deal with. This proof provides unique challenges in the automated environment where any system is intended to operate solely "online".

The third proof, "proof of authority to deal" (or "proof of entitlement") is multi-faceted. Three examples of this proof are that transactions placed for registration are:

- made by parties who have legal capacity; and
- not in contravention of legal requirements; and
- made with authority obtained from an appropriate title custodian.

---

31 Law Commission, above n 21, at iv.

32 See generally, Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 238–239.

33 At 235.

34 RP Thomas "Land Transfer Fraud and Unregistered Interests" [1994] NZ Recent Law Review 218 at n 60. Having said this, the New South Wales Registry has encoded the outstanding duplicate title which needs to be presented with dealings for registration. This overcomes many concerns raised in this article dealing with issues such as "proof of ownership" and some aspects of "proof of authority to deal," which will be discussed further.

35 See generally, Thomas, Low and Griggs "Three Proof Requirements", above n 2.

36 We are thankful to Nick Bohm, counsel and trustee of the Foundation for Information Policy Research, for pointing out that proof of "identity" is somewhat misleading, as it is always context driven, and therefore can be a confusing expression. A driver's licence is not proof of identity, per se, but proof a driver's licence has been issued to a person whose name is given on the issued licence. Proof of name (which may be tendered by producing a driver's licence) is a more accurate descriptor of what we intend.

This proof requirement traverses areas of expertise which were (and may be still be) the province of experienced registry staff.[37] It raises issues of how such experience under a paper-based system can adequately be translated under an automated registration experience where (say) a virtual registry is operated by conveyancers acting as "de facto" registrars, without any third party involvement.[38]

VI Australasian Automation Proposals

The Australian and New Zealand automation procedures have previously been assessed under these three proof requirements.[39] Conclusions were drawn that Australian and New Zealand proposals are not credible in terms of proof of ownership and of proof of authority to deal.[40] Indeed, on reflection, the assessment of proof of name (the first proof requirement) may be less secure than was previously thought to be the case.

A *Current approaches to proof of name*

All the Australasian systems place a primary focus on proof of name as the key issue for accessing automated registration, at the expense of the other two proof requirements.[41] As Governments already have various means of establishing identity, be they passports, drivers' licences, or other such equivalents, this appears to be an easy "win" in terms of automation proposals. However, on further consideration, such confidence may be misplaced.

We argue that drivers' licences or passports cannot be treated by conveyancers as credible proof of name. Given modern technological advances,[42] manufactured approximates of both may be made with relative ease.[43] Indeed, the authenticity of such forms of identification as passports rely on embedded codes to be scanned by appropriate machines. However, given conveyancers are not issued with scanners,[44] the presentation of (say) a passport as a means of proof is as inherently unsafe as the presentation of an outstanding duplicate title under the old, now discredited, paper-based system.[45]

Given this, it is time to recognise that it is unrealistic to place on conveyancers the burden of certifying proof of name by production of such identification, without also issuing the means to read

---

37 In Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 237–238, we make the argument that experienced registry staff undertook a role under a paper-based Torrens system that was greater than mere processers of paper-based materials placed for registration.

38 This is the New Zealand Landonline experience.

39 See generally, Thomas, Low and Griggs "Three Proof Requirements", above n 2.

40 At 254.

41 See generally, Thomas, Griggs and Low "Electronic conveyancing in Australia", above n 2.

42 For examples, see Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 235, 242 and 251. This was due to the advent of computer imaging and photocopiers, enabling credible approximates of an original to be manufactured. The Council of Australian Governments (COAG) agreed in 2012 that work should be undertaken to develop a national measurement framework for identity crime to better inform efforts to implement the National Identity Security Strategy (NISS). The economic impact of identity crime to Australia is likely to exceed $1.6 billion dollars every year. There are an estimated 750,000–937,000 victims of identity crime each year in Australia. See Australian Government Attorney-General's Department "Identity crime and misuse in Australia" (21 October 2014) <www.ag.gov.au> at 4.

43 "In July 2012 the promoters of 'Confidential Access' (a now defunct website) were convicted at the Old Bailey of identity theft on an 'industrial scale' and of 'providing fraudsters with all the tools needed to create false identities'. They charged £50 for a utility bill and £800 for a set of professional sealed and certified trading accounts with a reference": see Patrick McCloy "Title Fraud" (16 August 2012) Law Society Gazette <www.lawgazette.co.uk>.

44 Arguably, such readers may be readily available and reasonably inexpensive. The Australian Government has recognised the problems surrounding identity theft and document verification and its Document Verification Service is available for private sector access on a fee-for-service basis. This access can ensure the verification of passports, visas, medicare cards, citizenship and driver's licences. See Australian Government Attorney-General's Department "Document Verification Service" <www.ag.gov.au>.

45 Thomas, Low and Griggs, "Three Proof Requirements", above n 2, at 235.

embedded electronic codes as the real means of proving authenticity.[46] Whilst it is arguable that even embedded electronic codes may not ultimately be safe from hacking,[47] the technology required to undertake such an exercise successfully requires a degree of sophistication. It is a safer proposition than the mere production of the documents for visual inspection.

B *Current approaches to proof of ownership*

Under the New Zealand Landonline system, the Registrar-General requires the conveyancer to give an undertaking as to proof of ownership, which the registrar then relies upon.[48] The registrar has published "standards for verification"[49] intended to deal with common transactions. For "routine transactions", proof of ownership may be satisfied by production to the practitioner of a copy of a local body rates notice, bank statement or utilities account addressed to the client at the property as acceptable proof of the client's link to the property.[50]

It must be said production of such secondary documents is not proof of anything, let alone best proof. In this regard, in New Zealand (as indeed must be the case in many overseas jurisdictions), local body rates notices, power accounts and bank statements are electronically produced.[51] Even if the produced document was original, arguably it could have been intercepted in the mail.[52] Alternatively, the produced document could easily have been factored together with little skill by an imaginative use of photocopiers and computers to create an approximation of an original.

The question may be asked: in an automated environment where it is reasonably accepted that the outstanding duplicate title no longer serves as reliable proof of ownership, is the production of a printed local body rates notice or a printed bank statement any better form of proof?

In Australian systems there is equally an onus on the conveyancer to provide proof of ownership but, to date, even less of guidance as to how this should be achieved has been published, though State land titles office are beginning to recognise and address this issue.[53]

C *Current approaches to proof of authority to deal*

Under the New Zealand Landonline system, the conveyancer stands in the position of the registrar when determining what dealings may be accepted for registration.[54] Again, open-ended undertakings

---

46 Identification of name can be carried out by a certification provided by Australian Post. "From September [2014], Property Lawyers and Conveyancers can send their clients to an Australia Post branch to have their identity verified if a face-to-face meeting isn't an option — a huge step forward for the growth of the industry": see Property Exchange Australia "PEXA announces Verification of Identity options" (26 September 2014) <pexa.i-events.info>. The announcement also suggests that this (somehow) "also provides more secure evidence of ownership and right to deal and, critically, that the person transacting with the property is the person named in the Register of Land as the registered proprietor".

47 See generally Steven J Murdoch and others "Chip and PIN is Broken" (paper delivered to IEEE Symposium on Security and Privacy, Oakland, 2010).

48 See generally, Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 240–249.

49 At 243.

50 See Property Law Section "Property Transactions and E-Dealing: Practice Guidelines" (July 2012) New Zealand Law Society <www.lawsociety.org.nz> at 59-62; and Land Information New Zealand "Standard for verification of identity for registration under the Land Transfer Act 1952 — LINZS20002" (30 October 2013) <www.linz.govt.nz>.

51 In New Zealand, local body rates are normally payable by the owner or lessee of the property: Local Government (Rating) Act 2002, ss 11–12.

52 For instance, one of the authors is aware of a fraud perpetrated where the fraudster caused mail addressed to the property to be redirected to him, apparently in an attempt to prove ownership of land by production of original mail.

53 New South Wales is the lead jurisdiction in Australia on this issue. It has issued verification of identity guidelines which other States have either, or will, largely replicate. See NSW Government Land & Property Information "How do I verify the identity of a person claiming a right to deal with land?" <www.lpi.nsw.gov.au>.

54 Greenwood and Jones, above n 2, at 330.

are given that the presented conveyance does not breach known statutory prohibitions against alienation.

By gazette notice, the Registrar-General has published some 23 different statutory provisions to be complied with by practitioners before certifying that the dealing can be accepted for automated registration.[55] This is discussed elsewhere.[56] This is an "offline" list, in the sense that the list is not itemised on the online system, nor brought to the attention of the practitioner when this "global" undertaking is given. Instead, the undertakings are covered by the rather bland, online certification that "statutory requirements specified by the Registrar for that class of instrument" have been satisfied.[57] The Registrar accepts such undertakings as a substitution for the involvement of staff experienced in processing registration. The conveyancer undertakes this additional responsibility without the benefit of any training in both recognising and overcoming difficulties that commonly arise during a registration process.

In terms of the Australian experience, an initial report obtained by the New South Wales registry leading to automation,[58] at least recognised some of these issues by introducing the concept of "CoRD" ("control of the right to deal"). This concept was intended to operate as an acknowledgment that a third party (for example, a mortgagee) will control the right to register.[59] However, in the rollout of PEXA,[60] it is unclear how this concept is to be applied and whether it is intended to extend to control of dealings affecting other third parties, or where registration conflicts with any legislative regime.

Examples where the CoRD principle may be usefully applied would be land transferred in breach of trustee obligations, assets vested by operation of law in an official assignee, or land which by virtue of its legal status requires consent of a third party before it is transferred.[61] Remember that under a Torrens based system, in the absence of title fraud by the party deriving the benefit, registration is good title by virtue of principles of certainty of registration.[62]

It appears that under most Australian automation proposals registration staff will be retained. This is markedly different from the Landonline solution, which is to create a virtual registry controlled by the conveyancers. However, it is not clear what the continued role of registry staff will be, even if they are retained.[63] Hopefully, the level of care exercised by registry staff will match in some way the guardianship role accepted by the registry in operating a manual system which required more "hands on" manual processing.

---

55 Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 245. See further "Statutory Requirements, Forms of Electronic Instruments, and Requirements for the Retention of Evidence" (26 September 2008) 144 Supplement to New Zealand Gazette 3925.

56 Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 244–246.

57 The language refers back to the wording of the Land Transfer Act 1952, s 164A(3)(c).

58 Land Property Information Divisions (NSW Department of Finance and Services) "Certificate of Title Solution for Concurrent Electronic & Paper-based Conveyancing" (31 October 2012) Land Property Information (NSW) <http://www.lpi.nsw.gov.au>.

59 At 1.4. As noted in Land and Property Information (NSW) "NEC News: More Q & A" (3 November 2012) <www.lpi.nsw.gov.au>: "A party has CoRD when that party has authority to consent to the registration of a subsequent interest in land. CoRD has been traditionally evidenced by legitimate possession of the paper Certificate of Title".

60 Part two of the Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW) establishes the Electronic Lodgement Network (ELN), with this to be known by the acronym of PEXA (Property Exchange Australia). This system stemmed from the work of Property Exchange Australia Ltd, an unlisted public company owned by some of Australia's largest financial institutions, together with the governments of Victoria, New South Wales, Queensland, and Western Australia. Property Exchange Australia Ltd will run the national property exchange and will be open to non-shareholders though separate from direct government oversight.

61 This may be conservation land, land set aside for Public Housing, or in the New Zealand context, Māori protected land.

62 This realisation is important as it appears (at least in terms of the operation of Landonline) that there are presently fewer recorded incidents of fraud than was the case under the operation of the manual system.

63 The operating and participation rules for PEXA have focused on conveyancers as the subscribers to the system. The Land Titles Offices of each State have been involved in the process through ARNECC (Australian Registrars' National Electronic Conveyancing Council), see: <www.arnecc.gov.au>.

D *What does this tell us about existing system designs?*

In many respects, this overemphasis on proof of name, at the expense of proof of ownership and proof of authority to deal, is irresponsible. As already noted, good system engineering is about automating the hard part first, and not the easy part. Unless a credible means of overcoming obstacles concerning all the three proofs is achievable, questions should be raised about whether an automation process should proceed at all.

VII What is the Difference in Risk?

A *Manual processing*

In the past, those charged with operating a manual system may often have acted as an effective check against fraud and irresponsible behaviour, certainly in terms of systematic fraud.[64]

Being a Recorder or Registrar[65] under a paper- based system was often a chosen, lifelong vocation. Not unnaturally, those serving as registrars had different perspectives of how the system operated and developed different skill sets.[66] Any registration may involve multiple low level checks assessing the credibility of a dealing. Intuitively, if something did not look "right," further investigation and collaborative teamwork may be applied to "brainstorm" a possible solution. Although personal quirks of various registrars when querying the actions of conveyancers may well have caused frustrations, such foibles and unpredictable uncertainties often acted as a barrier to systematic fraud or abuse. Consequentially, it became difficult to manipulate or predict outcomes in the absence of fraud by registry staff. On the other hand, manual checks must be recognised as a haphazard protection against fraud, given the indiscriminate and variable nature of practices and the possibility of human error attendant on such processes.

B *Computers*[67]

In terms of system operation, the user of an automated system is in the hands of the architect or designer of the programme. The programmer sets the nature of the discourse. A computer-based system operates at its interface through simple binary choices. It consists of a number of programmed processes and choices laid out within the algorithm behind the programme. Nor will the workings and the programming of the system be apparent to users in terms of hidden "interactive" codes or possible viruses. Under the pre-set processes, a number of given possibilities are offered at every stage of programmed sequence. One of the proffered solutions must be accepted or rejected in order to move on to the next stage or the user must return to a previous stage in the programme. For this reason, a query cannot arise unless conceived at the design stage by the architect of the system as an issue requiring a programmed response.[68]

Unlike a human brain, a computer is unlikely to be able to compare and judge multiple forms and lines of evidence or undertake simultaneous reasoning. Unless the programmer at the design stage perceives a particular set of circumstances as being a threat which requires a programmed response, the computer will not comprehend that threat. Although computers make an excellent adjunct to

---

64 A further and more detailed explanation of the workings of the manual Australasian Torrens systems is provided in Thomas, Low and Giggs "Three Proof Requirements" , above n 2, at 231–239.

65 "Registrar or Recorder" is the term used in Australian jurisdictions; "Assistant Land Registrar" in New Zealand.

66 See further, the general discussion in Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 236–239.

67 The authors are indebted to suggestions and comments made by Ed Johnson, Emeritus Fellow of Wolfson College, Cambridge, on this section of the article.

68 Whilst it may be conceivable that computer programmes of more sophistication exist, an issue may well be whether they are sufficiently stable in terms of operating functionability, or achievable in terms of available funding.

human endeavours this should not blind us to what they cannot do. It is dangerous to assume that they are equivalent of, or provide a satisfactory substitute to, the exercise of discretion and judgment.

C *Different risks*

The risk paradigm under a manual system and an automated system do not operate in parallel. If a fraudster understands the detail of computer programming, he or she may be able to overcome its inbuilt controls with catastrophic consequences in terms of the operation of the system. One abuser striking at a point of vulnerability may create, over a short period, mayhem.

VIII Recognition of the Influence of the Reasons to Automate

Obviously, a combination of factors will drive any automation project. However, the prime reason to automate will inevitably affect or drive the design parameters. Three possible key reasons for automation are identified. These serve as a framework for discussion of possible choices made in any automation proposal.

A *Politics*

Automation can be politically driven. A government may see automation as a public manifestation of its desire to be seen as progressive and business friendly. The danger of such a directive in terms of system design is that delivery in a timely manner can become an issue of political credibility, causing difficult design issues to be minimised or bypassed.

Without asserting that is this necessarily an illustration of the impact of political deadlines, the Australian Government has announced that by 2017 virtually all government services will be "online" as a key part of its economic development strategy.[69] Perhaps in a similar vein, the Land Registration Act 2002 (UK) ("LRA 2002") was legislated under a government directive to automate.[70]

B *Efficiencies and savings*

Another driver of automation could be a desire to achieve savings. Here, land registration may be treated primarily as a processing system, which can be more efficiently undertaken if computerised. On this basis, physical registries may be closed and registry staff made redundant. Under this reasoning, system choices may be influenced by savings made in volume processing, which can then be passed on to the consumer. Released statistics often herald the success in terms of the speed with which "low lying fruit," such as registration of simple transfers, mortgages or discharges of mortgage are achieved.[71]

The difficulty of this form of approach is, again, a design issue. As previously discussed. the credibility of any system should be determined by the way it handles difficult conceptual issues, rather than bulk. Although issues such as fraud and abuse may infrequently occur, when they do, the

---

69 Government News "Coalition promises "virtually all" government services to be online by 2017" (2 September 2013) <www.governmentnews.com.au>. This is an Australian Government initiative to enable online dissemination of government news and initiatives to members of the Australian Public.

70 See general discussion in C Harpum, S Bridge and M Dixon *Megarry and Wade The Law of Real Property* (8th ed, Sweet and Maxwell, London, 2012) at [7-157]. The LRA 2002 created a framework for the introduction of a system of paperless conveyaning. As the authors note, automation has been "postponed". This is due to concerns about whether the integrity of the register can be maintained under an automated system.

71 Muir, above n 2, at 311 states: "The ability to electronically lodge and instantly register title transactions will revolutionise conveyancing practice." See also "Land*online* hits the road to increase update of e-dealing" (2004) 627 Law Talk 12.

result may be catastrophic in terms of continued public confidence. If a weak link is found under a computerised system, a single operator can create havoc.

Again, without asserting this to be necessarily so, in New Zealand Landonline is a virtual "online" registry. In essence, it appears to be a simple data processing system, where the integrity of the register is achieved by requiring conveyancers, licenced to operate the system, to certify that they will not abuse it.

C *Outmoded systems*

Finally, the principal reason to automate may be recognition that manual, paper-based registration practices, designed for 19th century conditions, are now both unsafe to operate as well as outmoded. This realisation is important, as it accepts automation is inevitable. The issue is then how to make the best choices to achieve the desired result, as opposed to proceeding with automation proposals without due recognition of possible risks.

Such a realisation is twofold. First, the physical task of processing vast amounts of paper in a time efficient manner has proved difficult. Secondly, controls designed to deter fraud under 19th century paper conditions, prior to the introduction of computers, photocopiers and document imaging, are now patently clumsy, unsuited and indeed unsafe.[72]

IX Who carries the Risk of Abuse under Automated Systems?

This ultimately is the key question. If the State no longer accepts the responsibility of policing an automated system against abuse, and conveyancers become the ultimate indemnifiers against abuse, the purpose of registration will be to determine which of these parties (the State or the conveyancer) bears the loss.[73] If we then conclude that under automation the outcome of registration may be unsafe, we then have to ask whether such a system can still be considered "Torrens" in nature.

Existing writing to date on New Zealand and Australian automation has focused on the transfer of risk from the registry back to the party presenting the dealing for registration.[74] Conveyancers given access to the register effectively underwrite the integrity of the system against abuse or misuse by providing a form of warranty that the transactions satisfy the three proof requirements.

This transfer of risk arises in a twofold manner. First, the conveyancer or other authorised user invariably has to certify that the dealing presented for registration complies with all legal requirements.[75] Although this feature may have been common to manual, paper-based systems, as discussed, that undertaking did not result in findings of culpability and the Registrar seeking indemnification for negligent certification.[76] By way of contrast, access rights to automated registers have been withdrawn from negligent conveyancers in New Zealand, irrespective of any loss having been suffered.[77]

---

72 Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 235.

73 Indeed, argument may be advanced that the operation of the old deeds system was somewhat safer than the operation of a Torrens regime that produces uncertain outcomes. Under the deeds system, by operation of standard principles, the title of the prior owner was preferred unless a better title could be proved, and the system preferred existing title tenure by operation of constructive notice principles operating against land title holders. Thus, under this prior system the outcomes were more predictable.

74 Thomas "Fraud, Risk and the Automated Register" , above n 2, at 362–363; and Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 246–249.

75 Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 241.

76 At 236.

77 The New Zealand Law Society publication *LawTalk* of 16 August 2013 recorded a Law Society Lawyers Standards Committee investigated "on its own motion" a practitioner who failed to provide correct certifications to Land Information New Zealand (LINZ) in accordance with its published e-dealing requirements. The Committee imposed a censure and fined the practitioner $7,500 (and awarded costs) stating that the practitioner had "created a risk to the

Secondly, there is a largely unnoted form of further indemnification. It is something of an industry standard for users of online systems to undertake to the service provider that the online system will not be abused as a condition of being granted online access.[78] In this manner, the small print of online access agreements often imposes personal liability on conveyancers in the event that any abuse of the electronic system occurs. This is an added layer of indemnification not duplicated under a manual, paper-based system.[79]

By way of illustration, under Landonline, the "Landonline terms and conditions"[80] clearly shift the risk of abuse onto the user[81] in terms of access onto the system by use of "Security Measures."[82] The consequences of breach are also clearly set out. Indeed, Land Information New Zealand (LINZ)[83] excuses itself from liability under the access agreements for any issues due to the fault of the user.[84]

The potency of such undertakings is yet to be realised in Australasian Torrens systems. It will remain academic until (or unless) the State seeks indemnification and compensation from users because of breaches by users of the LINZ User Agreement Terms, or the Australian equivalent.

This previously uncommented-on issue is critical in terms of transfer of risk. Should the State never seek indemnification from users where they have breached access agreements when an

---

efficacy of the land transfer system". The RGL had already "suspended" the practitioner's user rights to sue Landonline. There was no suggestion the practitioner's actions led to any damage or loss as a result of this casual certification. The full article is appended. "Fined for ongoing non-compliance with e-dealing requirements" (2013) 825 Law Talk 33 at 33.

78 For New South Wales, the relevant provision is the Electronic Conveyancing (Adoption of National Law) Act 2013 (NSW), s 26**.**

26 Subscribers required to comply with participation rules:

(1) A subscriber who is authorised under a participation agreement to use an ELN [Electronic Lodgement Network] must comply with the participation rules relating to that ELN.

(2) If a subscriber contravenes those participation rules, the Registrar may:

(a) if the Registrar operates the ELN, restrict, suspend or terminate the subscriber's use of the ELN, or

(b) if an ELNO [Electronic Lodgmenet Network Operator]operates the ELN, direct the ELNO to restrict, suspend or terminate the subscriber's use of the ELN.

(3) Subsection (2) does not limit or affect any right, power, authority or remedy that the Registrar or an ELNO has under the operating requirements, the participation rules, a participation agreement or any other law of this jurisdiction in relation to contravention of the participation rules.

79 This issue has gone largely uncommented upon. Instead the automation dialogue invariably focuses on cost and time savings to conveyancers in terms of achieving immediacy of result as a result of online registration — which in turn is heralded as enabling savings to be passed on to their clients as consumers.

80 Land Information New Zealand "Landonline terms and conditions" <www.landonline.govt.nz>.

81 Clause 17 of Land Information New Zealand's "Landonline terms and conditions", above n 80, provides as follows:

17 Any use of Landonline by any person with access to the Security Measures used or made available to you or any of your people (whether authorised by you or not) constitutes sufficient authority for LINZ to:

17.1. act on any enquiries, provide such information, update its registers or to otherwise transact such dealings, with or under the instruction of that person …

82 "'Security Measures' means logon names, passwords, private keys used in relation to Digital Certificates or other measures provided to you or your people by LINZ or the LINZ Registration Authority from time to time to enable access or continued access to Landonline": see Land Information New Zealand, above n 80.

83 The Government body directed to control land registration dealings.

84 "Your obligations to LINZ", see Land Information New Zealand, above n 80:

1. You shall be liable to LINZ for reasonably foreseeable costs (including settlement and legal fees), damages, losses or expenses that LINZ may incur, suffer or become liable for as a result of:

1. 29.1. your breach of this agreement;

2. 29.2. your or any of your peoples intentional misuse of Landonline;

3. 29.3. your or any of your peoples negligent acts errors or omissions; or

4. 29.4. any claim, suit, action or proceeding brought by a third party against LINZ as a result of the matters set out in paragraphs 29.1–29.3. except to the extent that LINZ is at fault through any act or omission …

except to the extent of LINZ's obligations under statute to provide compensation in the circumstances prescribed by such statute or statutes.

improper transaction is registered[85] then the position may be no different to what it is now. The purchaser will get indefeasibility and the defrauded owner compensation from the State. However, in an environment of increased risk of abuse it may be more likely the State would seek to pass on any increased liability.

In this regard, it seems unlikely a Government directive to automate would accept any proposal that led to an increased exposure of the Government to liability claims. Indeed, further to any government initiative to commercialise services traditionally provided by Central Government, registries may reposition themselves as service providers, rather than fulfilling the previously key function of custodians or guardians of the integrity of the register (which is obviously backed by the State guarantees of title inherent in the Torrens concept of indefeasibility). Consequentially, the risk of abuse may increase proportional to the extent registry staff no long carefully police the system for abuse and noncompliance. Evidence of such a possibility may be signalled by the New South Wales[86] and Queensland[87] governments which have imposed increased responsibility on mortgagees where they fail to act with due care in verifying the party before them.[88]

X How Automated Systems are Introduced into Operation

Research to date indicates that unless an automated system has widespread support it will not succeed unless introduced by compulsion.[89] In this vein, Landonline was introduced into New Zealand as a compulsory registration system for most purposes.[90] No other known country has been bold enough to force compulsion in this way. Consequentially, conveyancers in New Zealand have been forced to accept the proffered User Agreement Terms in order to be able to continue to offer conveyancing services.

The automation proposals in England and Wales, as well as those in Australia are understood to optional and will operate in conjunction with the existing manual system. In order to engender support, many automated systems are initially introduced on something of a trial basis, alongside the continued operation of the manual system.

However, operation of any dual system must be regarded as inherently problematic in terms of safe practice.[91] This is because where an automated system operates in parallel with a manual systemthis can result in inconsistent outcomes. In this regard, it should be remembered that Torrens systems operate strictly in terms of priority being afforded to dealings presented for registration from the date of receipt.[92] No dealing can be processed until a prior lodged document has either been registered or rejected. However, with manual registration occurring alongside automated registration we have two incompatible systems, operating on the same register. A remotely set up automated dealing will trump any manual dealings that has been posted in the mail for processing.[93] Such

---

85 The Registrar may instead suspend or remove access privileges.

86 Real Property Act 1900 (NSW), s 56C.

87 See Land Title Act 1994 (Qld), s 11A(2).

88 Under the new proposed Land Transfer Act, the New Zealand Law Commission has proposed a similar regime also be introduced. See Law Commission, above n 21, at [2.19] and [2.24].

89 See Ioana Bour *Electronic Identities in Europe: Overview of E-ID Solutions Connecting Citizens to Public Authorities* (Underwriters Laboratories, The ID Management Competence Centre, 2013) at 4–7.

90 See generally Rod Thomas "Fraud, Risk and the Automated Register", above n 2, at 349 at 359–361.

91 At 359–361.

92 In terms of New Zealand, see the Land Transfer Act 1952, ss 37 and 41.

93 Under an automated system, the registration can occur at the same time the funds are released. Thus registration is almost instantaneous, and closely follows the financial transaction between the parties. In New Zealand, following automation, nearly all physical land registries have been closed. Thus if a manual dealing is being undertaken, it invariably has to be posted to the registry. If the settlement funds are handed over in consideration for the right to manually present dealings for registration, pending receipt by the registry of your documents through the mail, there is no way of knowing whether a competing automated dealing may at any time trump your registration.

outcomes must sit uneasily with the hopes of providing a robust system that ensures fair, safe and predictable outcomes. It would also follow that where a private individual wishes to undertake manual registration, both parties must do so. Alternatively, a conveyancer acting for one of the parties must be prepared to give undertakings to act for both parties in processing the dealing as an automated transaction.

Practically, if automation cannot be forced on conveyancers, as it has been in New Zealand, a more subtle means of ensuring compliance is available. This may occur where major institutional banks are persuaded to endorse an automated system which has benefits in terms of speed of transactions and reduced operating and transactional costs. Where such lenders require automated registration as a standard term of advancing or repaying loan funds, lesser players will follow suit. Thus, in a relatively short period of time, nearly property transactions will become automated. Indeed, an earlier automation proposal in Victoria failed to obtain traction after major banks refused to endorse that proposal.[94]

XI Four Possible Proposals

Given the preceding discussion, what are some of the options presently available to automate a Torrens system? Four are suggested, dictated by the extent to which the State will accept responsibility for the consequences of the act of registration.

The proposals are:

1. Diluting the benefits of registration;
2. Delaying the benefit of registration;
3. Transferring responsibility for registration; or
4. Accepting the risk of abuse.

None are a direct translation of responsibility and risk undertaken under a "pure" paper based Torrens system.[95]

A *Diluting the benefits of registration — extension of overriding interests*

Although the nature of indefeasibility has been much heralded, in practice all Torrens regimes allow many "off register" exceptions to the indefeasibility regime. [96] In most regimes, acknowledged exceptions range from the application of local government ordinances, town planning regimes, taxes, Public Works acquisitions, territorial authority rating sales, adverse possessory interests and others of a similar ilk.

The Land Registration Act 2002 (UK) expressly exempts certain "overriding interests" (as they are colloquially known) from the State guarantee.[97] These include interests such as third parties in actual occupation, short-term leases,[98] certain legal easements and profits-à-prendre, "customary and public rights," "local land charges," certain "mines and minerals", and "manorial rights".[99]

If it is accepted that implementation of a fully secure Torrens system may be untenable in the short term, indefeasibility may be expressly be made subject to any number of further, stated,

---

94 See Thomas, Low and Giggs "Three Proof Requirements" , above n 2, at 249, n 106.

95 Other options are discussed Thomas, Griggs and Low "Electronic conveyancing in Australia", above n 2, at 14–16. None of the four proposals in this article include private PIN numbers being issued to the holders of registered land interests. At the time of writing, such an option is not considered realistic and appears unlikely to be endorsed or favoured by the public — or indeed safe from abuse. See generally, Bour, above n 89.

96 Elizabeth Cooke *The New Law of Land Registration* (Hart Publishing, Oxford, 2003) at 76–77.

97 See generally Cooke, above n 96, at 78 and 164.

98 These are for less than seven years.

99 See Land Registration Act 2002 (UK), sch 1 and 3.

interests. Examples may be where one may expect CoRD principles to operate, such as transactions in breach of certain consent requirements, or even transactions that are in breach of trustee powers.

Such a proposal is both easy to implement and cost effective, as the State indemnification simply will have no application to the stated exceptions.

However, such a proposal does raise issues in terms of system integrity. Patently, too many exceptions affect not only affect the quality of title, but will also adversely influence transactional costs. The parties to any transaction will have to absorb or insure against the increased cost of undertaking preliminary investigations of potential "off title" interests, before committing to the transaction.

B *Delaying the benefit of registration — introduction of delayed or discretionary indefeasibility*

The introduction of delayed indefeasibility protection potentially provides a safer, equally low-cost option as diluting the benefits of registration.

Under such a proposal, a registered dealing may not become fully "indefeasible" until a settled period of time passes after registration has occurred.[100] This gives a period of grace for the registration to be challenged by an affected party.[101] After all, any new registrant will probably have either attempted to take possession, sought to receive the benefits of the receipts of the land such as rentals or, if a mortgagee, will have an expectation of receiving mortgage interest payments. Under any one of these situations, there is an increased likelihood or opportunity of discovering fraud or improper dealing within a short period following the act of registration. To assist this process, flags may be hidden within the system, which identify behaviour the programmer associates with system abuse, falling short of purchaser fraud.[102]

The New Zealand Law Commission has recommended the introduction of delayed indefeasibility[103] and this recommendation merits some consideration. It proposed an interim period following the registration event, where a court may overturn a title where a claim of "manifest injustice" has been made out. Thirteen grounds are provided to guide the court. The new registrant may not be aware of the relevance (or indeed existence) of many of these grounds until the issue is put before the court. Most favour the return of the land to the dispossessed landowner.[104]

Nevertheless, the Law Commission proposal is open to criticism in one key respect, which arguably has the effect of negating a key aspect of indefeasibility. If registration is challenged, the new registrant must fund the cost of defending his or her registered status. This means that the hapless registrant may have no assurance of whether the registration will be respected or not, pending the matter being resolved by a court determination. This unfortunate registrant (who is not guilty of fraud) will consequentially have to absorb the cost of defending his or her title — and on grounds which he or she may not have been aware of at the time of registration. Given this, even if the new registrant is

---

100 A similar idea to this was suggested by the Scottish Law Commission. See Scottish Law Commission "Discussion Paper on Land Registration: Void and Voidable Titles" (Discussion Paper No 125, 2014) at 84.

101 Somewhat analogously, Part III Division 4 of the Land Titles Act 1980 (Tas), provides a system of qualified Torrens title. Where land is being brought under the Torrens Act for the first time, and the Recorder of Titles is not convinced that the applicant is entitled to the estate that is claimed, a qualified title can be issued. The "caution" issued in relation to the title will lapse after twenty years. See also Real Property Act 1900 (NSW), s 28B. A similar initiative was legislated in New Zealand by the Land Transfer (Compulsory Registration of Titles) Act 1924, which provided for the government to issue Torrens titles, limited as to "parcels" or as to "title." This is now Part 12 of the Land Transfer Act 1952.

102 These flags will be too late to enable registration to be overturned, if the system in question is an immediate indefeasibility system as is presently operable in both New Zealand and Australian jurisdictions.

103 This is argued to be the effect of the New Zealand Law Commission Report, above n 21, set out at [2.11]–[2.16], even though the report refers to the proposal as "immediate indefeasibility with limited judicial discretion". See further discussion in Rod Thomas "The proposed legislation of discretionary indefeasibility and its effect on key Torrens principles" NZULR (forthcoming).

104 See generally Thomas "Reduced Torrens Protection", above n 22.

then successful, he or she will be financially worse off, as the State guarantee only applies where the registered interest is lost.[105]

Arguably, such a proposal would be more palatable if the State (and not the new owner) funded the owner's litigation costs of under such proceedings. After all, the proposed "manifest injustice" test is separate from that of Torrens fraud, so surely the principle of indefeasibility should cover the risk of unsuccessful challenges where no fraud is pleaded.[106]

C *Transferring responsibility for registration — reliance on third party undertakings*

This is the equivalent of introducing something akin to a simple data processing system, which places the risk on the conveyancers, where those parties give undertakings to the registrar as a condition of being granted access to the system that the system will not be abused. Such a system has a patent attraction on terms of design simplicity and ease of implementation. Indeed, it can be argued that the conveyancers' increased obligations are essentially an effective guard against abuse.[107]

With such considerations in mind, the New Zealand implementation of Landonline has some appeal. It relies for its integrity almost exclusively on undertakings given by conveyancers.[108] If a key driver to implement automation is to provide an online system by a set target date, or under severe budgetary constraints, such a system may offer the best alternative. However, over time, the transfer of risk of registration abuse or misuse to conveyancers will in all likelihood lead to higher transactional costs.[109]

Under such a proposal, the State still plays a role in auditing compliance with the system but, of necessity, this "policing" function now occurs after the registration event has taken place. At this stage, the abuse may not be reversible, given the nature of indefeasibility.[110]

Unless such a system can be forced on conveyancers,[111] it is hard to see that such an alternative is viable. After all, the risk of abuse and misuse is placed squarely back on the users with an attendant increase in financial risk for those parties.

D *Accepting the risk of abuse*

---

105 These issues are discussed more comprehensively in Thomas "The proposed legislation of discretionary indefeasibility and its effect on key Torrens principles", above n 103.

106 Again, the hapless registrant may not be aware of the asserted grounds being argued to overturn the registration. The proceedings are plaintiff orientated and do not favour retention of the registered status.

107 This will be true — pending abuse occurring. Sceptics may consider an increased opportunity to abuse the system will inevitability (over time) lead to greater abuse. New Zealand is a relatively small country with a population of just over 4 million. A fraud of significant proportions could have significant repercussions in terms of continued public confidence. However it has to be accepted that as at 2011 the New Zealand Registrar-General confirmed recorded incidents of fraud had lessened under the automated system from those previously recorded under the old, paper based system. See Thomas "Reduced Torrens Protection", above n 22, at 735, n 94.

108 Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 244–246.

109 Title insurance could be used as a mechanism to mitigate against this increased risk. An innovative response found in New Zealand has been to combine these two elements. At least one known legal practice promotes title insurance as a standard conveyancing cost. If a client elects not to carry insurance, the conveyancing fee is increased by the firm as an acknowledgment of the increased risk it absorbs in being engaged to carry out the title registration, including risks arising from the operation of the automated system.

110 Under New Zealand's Landonline, the Registrar-General audits compliance with conveyancers' record keeping to check for compliance with the key issues of proof of name, ownership, and authority to deal. However, this event occurs only after the registration event has occurred and thus the results may be irreversible. See Law Talk, above n 77.

111 As noted, this is the result of the introduction of such a system in New Zealand. An alternative would be for the main institutional banks operating in the jurisdiction to endorse such a system, causing other, lesser players to follow their lead. This trend will only occur if the banks consider they are, in turn, protected from risk of abuse and misuse of the system. Such protection will presumably arise from undertakings the banks receive from conveyancers retained to represent their interests.

Under this proposal, the registry will not require "open ended" indemnifications from conveyancers. Instead, if published prescriptive checklists are followed, conveyancers will have discharged their responsibilities to the State. Consequentially, risk of abuse will remain with the State.[112]

This is more akin to the operation of a manual Torrens system, where the State effectively policed the system and absorbed the risk of abuse.[113] Illustrations of how such principles could translate in an automated environment follow, by use of the Landonline proof requirements.

In terms of proof of name, this would be satisfied where the conveyancers requirement to verify identity is satisfied by completion by the conveyancers of one of a number of prescriptively set out checks, rather than assenting to an open ended undertaking to the Registrar. Thus, the need to verify identity is met where a credible passport or other form of identification card such as a driver's licence is produced to the conveyancer.[114] Likewise, in terms of proof of ownership, production of a printed local body rates notice, or other printed document addressed to the owner at the property, would satisfy the ownership test.[115] The issue of authority to deal could likewise be met by the conveyancer answering "yes" to an online list of direct questions on compliance with CoRD issues of competency and issues of statutory compliance.

Under such a proposal, registration comes with more risk for the State, so it would appear prudent for registry staff to be retained. The registrar may then determine which party's title registration is protected and which party is entitled to indemnification from the State. In terms of continued public confidence in the integrity of the system, where a contest arises between an individual and a mortgagee, the mortgagee can reasonably be expected to be compensated with a monetary payment.

XII Conclusion

This article has canvassed relevant issues concerning the introduction of an automated Torrens system and has outlined four possible proposals to move gradually towards full automation. The main identified issues are ongoing public confidence in the titling system, and who carries the risk. If the system is not secure in terms of results under strict Torrens principles, its operation may lead to unpalatable outcomes, which then results in a diminution of public confidence in the titling system. Secondly, if the system is more vulnerable to abuse, any movement of that risk from the State to conveyancers will lead to the increased cost of doing business being passed on to the consumer.

The issue of good design is critical. One is wary of emulating Mrs Armitage's bicycle.[116] When she enthusiastically added too many gadgets, her bike became unstable with obvious results. However, one can avoid Mrs Armitage's fate. Steps can be made to move incrementally towards automation, with manual processing kicking in at critical stages. Then, over time, as online systems develop in sophistication and become more commercially secure, other parts may be automated. What this article proposes is that any one of the four measures may be introduced as interim steps pending more secure operating systems becoming viable:

1. Diluting the nature of the indefeasibility protection offered by introducing further "overriding interests" or more extensive exceptions being legislated to the offered indefeasibility protection;

---

112 Alternatively, additional proof criteria could be required of banks, given the prevalence of identity fraud issues.

113 Thomas, Low and Griggs "Three Proof Requirements", above n 2, at 236–240.

114 Thus, if the passport is subsequently found to be a forged approximate, the risk of this abuse is a matter for the registry and not the conveyancer.

115 This is presently the standard of proof for more straightforward dealings.

116 Quentin Blake *Mrs Armitage on Wheels* (Random House, London, 1999).

2. Delaying the benefit of indefeasibility protection for a stipulated period of time after the registration event, by the reintroduction of the concepts of "delayed" or "discretionary" indefeasibility;
3. The State accepting that, given an automated system is more open to abuse, users of the system will in future underwrite any abuse in consideration for being given the privilege of access to the system; or
4. Introducing a system where immediate indefeasibility is offered (as is the case under many Torrens regimes) but the State makes a policy decision to absorb the risk of any increases abuse or misuse. Under such a proposal, users of the system would not provide to the State open ended undertakings that the automated system would not be abused. Instead, they would only be liable if they failed to follow prescriptive operating procedures required by the State in terms of operating procedures. The State would also have a role in deciding where the monetary compensation should be paid, which, in many cases will be better directed to the mortgagee and not the innocent defrauded landowner who has lost his or her home.

By way of closing, the preceding discussion enables us to offer for consideration seven guidelines for architects of any automation proposal.

1. A system that transfers risk from the State to users is not a continuation of a conventional Torrens system. If risk transfers back to the users, we may revert to the problems of increased conveyancing costs and uncertainty of title tenure which the Torrens system was introduced to overcome.
2. A straightforward risk analysis between a manual system and an automated system is fraught with difficulty as they are designed to satisfy different operating conditions.
3. Existing automated systems rely on a proof of name and give inadequate protection to proof of ownership and authority to deal. This is seen to be a key flaw with existing systems.
4. The credibility of any automation proposal needs to be determined by how it deals with the hard issues, such as fraud, and not on its ability to transact volume at low cost.
5. Continued public confidence in the security of land tenure should be a key criterion in determining the success of any automated system, as opposed to the limited extent of any recorded abuses.
6. There is a difference between a homeowner losing their house and a mortgagee their investment. The mortgagee's loss is more compensable than the other in terms of financial payment.
7. If the drivers to automate are irresistible and a sound system cannot be introduced, some form of staged introduction should be considered. In this regard, reference is made to the four proposals set out in this article.

Given the increased risks that come with automation, title insurance is likely to become a more significant issue as automation proposals are introduced. Indeed, Ontario, as one of the first Torrens systems to automate (albeit as a deferred indefeasibility regime) has an established practice of landowners obtaining title insurance as a standard cost of any conveyance.[117] One is left to ask again whether, if risk is transferred from the State to the user, and the outcomes are not safe, can the introduced automated system truly be considered Torrens in nature?

[117] In Australia, the focus of the title insurers has been working with the mortgagees and in insuring against their risk. The experience in Ontario is that most transactions are accompanied by title insurance on the recommendation of the parties' lawyers. Email from Caroline Yonis (General Counsel, First Title Insurance, Sydney) to Rouhshi Low (QUT University) concerning the prevalence of title insurance in Ontario (8 September 2014). In New Zealand, title insurance is available but is not commonly taken out.